

acting on its petition. In 1997, CEI amended its complaint to challenge ATF's denial of the rulemaking petition. CEI also alleged that ATF had a "de facto" ban on the use of health claims, which violated the First Amendment and the FAA Act. In 1998, the district court granted the Government's motion for summary judgment on CEI's challenge to the denial of its rulemaking petition. Both parties filed motions for summary judgment on the remaining issues.

#### **VII. Other Health-Related Statements on Alcohol Beverage Labels**

On February 4, 1999, ATF approved two applications for certificates of label approval bearing directional health-related statements directing consumers to the Dietary Guidelines or their family doctor for information about the "health effects of wine consumption." ATF approved those labels based on its determination that the statements were not substantive health claims, but instead were neutral statements directing consumers to third parties for additional information regarding the effects on health of alcohol consumption. The first approved labeling statement read as follows:

The proud people who made this wine encourage you to consult your family doctor about the health effects of wine consumption.

The second labeling statement read as follows:

To learn the health effects of wine consumption, send for the Federal Government's *Dietary Guidelines for Americans*, Center for Nutrition Policy and Promotion, USDA, 1120 20th Street, NW., Washington, DC 20036 or visit its web site: <http://www.usda.gov/fcs/cnpp.htm>.

Prior to being approved, the two applications received a great deal of public attention. In July of 1997, both HHS and FTC urged ATF not to approve the labels until a consumer survey was conducted. In that same month, Senators Robert Byrd and Strom Thurmond wrote to the Secretary of the Treasury, also raising several concerns about the proposed labeling statements. ATF also received several letters from public health organizations concerned that the labels would encourage consumers to consume alcohol beverages for health reasons. In view of these concerns, ATF decided to defer final action on the labels pending the completion of a consumer survey by the Center for Substance Abuse Prevention (CSAP), a component of HHS.

In January of 1998, CSAP transmitted to ATF the main findings from its consumer survey. The survey found that most subjects reported that they do not

read wine labels, and that neither of the two labeling statements would likely induce wine drinkers to alter their drinking pattern, quantitatively or otherwise. However, several members of the focus groups reported that information about the positive effects on health of wine consumption from the media had led them to increase their wine intake.

While the CSAP survey did not establish that the labeling statements would influence the drinking patterns of wine drinkers, it did indicate that heavy drinkers may justify or increase their consumption levels based on their independent understanding of information regarding the alleged health benefits of moderate consumption. Furthermore, the survey established that consumers would be no more likely to seek additional health information after reading the proposed labeling statements.

Based on the evidence before it, including the consumer survey conducted by CSAP, ATF concluded that there was insufficient evidence in the record to establish that the directional statements tended to mislead consumers about the effects on health of alcohol consumption. Accordingly, the labels were approved.

The approval of these labels generated considerable interest from Federal health officials, members of Congress, and public advocacy groups, who expressed concern about consumer perception of the label statements. Of particular note, former Surgeon General David Satcher expressed concern that people might draw an incorrect message from these labels.

Moreover, ATF became aware of a number of press accounts interpreting the directional statements as actual health claims about the benefits of alcohol consumption. For example, on February 5, 1999, the "Wall Street Journal" wrote that the expected decision to approve the labels would allow "wine producers to put labels on bottles that point to the potential health benefits of their product." On February 5, 1999, the Associated Press reported the decision as follows: "Scientific studies have suggested it, and now winemakers finally may get a chance to tout it through their labeling: A glass or two of the grape each day could be good for you." On February 6, 1999, the "Los Angeles Times" reported that "[t]he federal government approved changes Friday that will allow winemakers for the first time to tout on labels the connection between drinking wine and better health." That same date, the "Washington Post" reported that ATF had "decided that winemakers may add

another label to the bottle to encourage consumers to learn more about the possible benefits of drinking wine." In an article dated February 9, 1999, the "San Francisco Examiner" stated that ATF's decision "would allow winemakers to carry bottle labels suggesting consumers check with their doctors or the government's nutritional guidelines on the possible health benefits of wine."

#### **VIII. Notice of Proposed Rulemaking**

On October 25, 1999, ATF invited comments on its current policy on health claims and health-related statements by publishing the policy as a proposed regulation in the **Federal Register** (Notice No. 884; 64 FR 57413). As proposed, labels or advertisements could not contain any statement, design, representation, pictorial representation, or device, whether explicit or implicit, representing that consumption of alcohol beverages has curative or therapeutic effects if such statement is untrue in any particular or tends to create a misleading impression. A substantive claim regarding health benefits associated with the use of an alcohol beverage would be misleading unless such claim was properly qualified and balanced, sufficiently detailed and specific, and outlined the categories of individuals for whom any positive effects on health would be outweighed by numerous negative effects on health.

ATF also sought comments on whether even balanced and qualified health claim statements should be prohibited because the negative consequences of alcohol consumption are so serious as to make any health-related statement on labels or in advertisements inherently misleading. In addition, ATF sought comments on whether health-related directional statements such as those approved in February 1999 tend to mislead consumers about the health consequences of alcohol consumption.

The comment period for Notice No. 884, initially scheduled to close on February 22, 2000, was extended until June 30, 2000, pursuant to Notice No. 896. (See following section, "Notice of Hearings.")

#### **IX. Notice of Hearings**

On December 9, 1999, ATF announced in a press release that after the close of the comment period, it would hold public hearings on the issue of health claims in the labeling and advertising of alcohol beverages. ATF stated that the hearings would provide it with a comprehensive record on